Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	CG No. 02-278 CG No. 05-338

COMMENTS OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES

The National Association of Chain Drug Stores ("NACDS"), through its attorneys, files these comments in opposition to the above captioned Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham ("Petition") filed on January 22, 2017.[1] The Petition seeks to reverse decades of regulatory precedence and practice in which the Federal Communications Commission ("FCC" or "Commission") has long recognized that the provision of a consumer's phone number to a business serves as prior express consent as required under the Telephone Consumer Protection Act ("TCPA") for pre-recorded or autodialed informational phone calls from that business to the consumer, absent instructions to the contrary. NACDS opposes this effort,[2] especially as it relates to prescription drug refill reminders and other critical

[1] *See* Federal Communications Commission, Consumer and Governmental Affairs Bureau *Public Notice*, DA 17-144, released February 8, 2017, seeking comment on the Petition.

[2] NACDS joins in and supports the comments of the Retail Industry Leaders Association and Cardinal Health, Inc. ("Cardinal Health Comments") also submitted in opposition to the Petition.

HIPAA-covered healthcare communications[3] ("healthcare communications") from pharmacies to their patients, because, as NACDS will show below, patients, the broader public health and the national healthcare system all benefit when such communications are unimpeded and encouraged.[4]

NACDS represents traditional drug stores, supermarkets and mass merchants with pharmacies. In the United States, these various types of chain drug stores operate more than 40,000 pharmacies and employ over 178,000 pharmacists, who fill over three (3) billion prescriptions yearly.[5] Pharmacists are able to help patients use prescribed medicines correctly and safely, while offering services that improve both patient health outcomes and healthcare affordability.

One of the increasingly critical tools in the pharmacist toolbox is the ability to quickly and efficiently contact patients on their phones to alert them to information related to their prescriptions and other healthcare benefits, such as notifications that the patient's supply of a maintenance medication is about to run out and is due under the doctor's orders to be refilled or that flu season has arrived and it is time for an updated vaccination. These types of notifications

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[3] The Health Insurance Portability and Accountability Act differentiates between patient communications for treatment , payment and health care operations, which are allowed under HIPAA, and patient communications for marketing, which are not allowed under HIPAA, unless patients have given the health care provider written authorization for such marketing communications. Consequently, healthcare providers are already regulated under HIPAA in terms of how they can communicate with their patients, as the Commission has recognized. *See infra* at 4-5.

[4] NACDS opposes this effort also as premature in light of the D.C. Circuit's pending review of the FCC's 2015 Order on the TCPA, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8029 (2015) ("2015 Order"), which touches, in part, upon similar issues. *See* Cardinal Health Comments at 1(discussing the pending *ACA International, et al. v. FCC, et al.* (D.C. Cir., No. 15-1211) ("2015 Order Appeal")). More specifically, Rite Aid, supported by an NACDS *amicus* brief, is challenging the "healthcare exemption" created pursuant to the 2015 Order in the above referenced appeal. This exemption places certain threshold requirements on healthcare communications directed to cell phone numbers previously provided to healthcare providers. Nothing in these comments waives NACDS' arguments before the D.C. Circuit in challenge of the FCC's "healthcare exemption."

[5] For more information about NACDS, visit www.NACDS.org.

have demonstrated efficacy in improving patient health and well-being, while lowering overall healthcare costs. Consequently, the Commission should deny Petitioners' request which, if granted, would undermine and impede such communications, ultimately threatening patient health and increasing healthcare costs.

I. Petitioners Contradict Themselves By Proposing to Effectively Increase the Consent Burden on Healthcare Communications While Pretending to Exempt Such Communications from their Proposed Written Consent Rule.

Petitioners acknowledge that healthcare communications should not be burdened by a prior express written consent requirement. They purport to leave unchanged the current prior express consent standard for healthcare communications while seeking to impose a prior express written consent requirement on all *other* informational, non-telemarketing communications. *See, e.g.*, Petition at 37 (excepting healthcare messages from the proposed prior express written consent rule); *see also id.* at 42 (leaving unmodified the prior express consent standard for healthcare calls in revised text for 47 C.F.R. § 64.1200(a)). At the same time, however, Petitioners seek to redefine "prior express consent" in a manner that would prevent healthcare providers from relying on the consent granted when a patient provides his phone number to a doctor or pharmacist as the means of contact for calls. Petitioners' request would seriously impede healthcare communications and inevitably push pharmacies and other healthcare providers to require written consent before risking huge potential liabilities by making such calls—exactly what the Commission has previously rejected and Petitioners' say they do *not* want. *But see* Petition at 3-4 (referring to pharmacies using a "prescription form"[6] to obtain prior express written consent).

[6] NACDS is uncertain as to what "prescription form" Petitioners are referring. Patients receive their prescription from the doctor and it is either electronically transferred to the pharmacy or delivered by the patient for later pick-up. Pharmacies are significantly restricted by law from adding information to or altering prescriptions.

Specifically, Petitioners want to redefine "express" oral consent in a formulistic way that makes no sense for and would inevitably impede healthcare communications. *See id.* at 48-49 (redlining revisions to the current definition of "prior express consent" to include an "agreement that clearly and expressly" allows for various nonhealthcare calls using autodialers or pre-recorded messages). If such a burdensome definition were adopted, the practical reality is that pharmacies could be pushed to obtain prior written express consent before first contacting patients about prescription refills, flu shot reminders and the like. This is exactly the outcome that the FCC rejected in its prior rulings which excluded healthcare communications from the TCPA's prior written express consent regime. *See also* 47 C.F.R. §64.1200(a)(2) and §64.1200(a)(3)(v).

II. The FCC's Prior Rulings Recognize the Unique Nature of Healthcare Communications under the TCPA and Its Consent Requirements.[7]

In the February 2012 FCC Order, CG Docket 02-278 (released 2/15/12), the FCC exempted health care calls subject to HIPAA, including prescription refill reminders, from *any* consent requirement when the calls are to residential lines. See *In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 27 F.C.C.R. 1830 (Feb. 15, 2012) ("2012 Order"). In the 2012 Order, the FCC concluded that "[i]n view of the privacy protections afforded under HIPAA, we exempt from our consent, identification, time-of-day, opt-out and abandoned call requirements all prerecorded health care-related calls to residential lines that are subject to HIPAA." 2012 Order at 1852. However, the FCC did not stop there. Its final rules extended the healthcare-related exemption from the *written* consent requirement to calls to cell phones too. *See* 47 C.F.R. § 64.1200(a)(2) (providing exemption for calls to cellular

[7] However, NACDS and its members believe the FCC has not gone far enough in relieving HIPAA-covered healthcare communications, and those that provide them, from all inapplicable TCPA burdens. *See, e.g.*, Brief Amicus Curiae of the National Association of Chain Drug Stores, Inc. In Support of Petitioner Rite Aid Hdqtrs Corp., 2015 Order Appeal (Dec. 2, 2015) , at 3-5.

services that "deliver[] a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those terms are defined in the HIPAA Privacy Rule."

While the Commission relied, in part, on the fact that HIPAA already regulates such calls and provides protections of patients' privacy, and that the calls "do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's health care provider to the consumer and concern the consumer's health," 2012 Order at 1855, the Commission also recognized the importance of these calls, noting that "we agree with commentators that assert that these calls ***serve a public interest purpose: to ensure continued consumer access to health care-related information.***" 2012 Order at 1854 (emphasis added). The Commission cited with approval comments showing that "an exemption would promote important communications by health care providers and health insurance plans with patients such as prescription refills and immunization reminders and that these communications promote health and streamline health care administration" and that an exemption "would allow the continuation of important communications by health care providers and health insurance plans such as prescription refills, immunization reminders and post-hospital discharge follow-up." 2012 Order at 1855-56, n.192, 1853 n.176.

Importantly, the Commission also acted to harmonize its regulations with those of the FTC, which had exempted health care-related prerecorded message calls subject to HIPAA from the restrictions of the Telephone Sales Rule. The FCC considered the findings made by the FTC in that regard and stated that "our record affirmatively supports adopting the FTC's approach" and "we agree with the FTC approach." 2012 Order at 1853, 1856. This is important because, as the FCC was well aware, the FTC had affirmatively found that prescription refill reminders and other healthcare communications provide critical benefits for public health, and the FCC accepted those findings.

The FTC recognized that ensuring that persons remember to refill their active prescriptions promotes treatment adherence and improves patient outcomes, especially for the most vulnerable patients—those "who are least attentive to their healthcare—those who 'frequently procrastinate or make ill-informed decisions.'" *See* Telemarketing Sales Rule Final Rule Amendments, 73 Fed. Reg. 51164, 51191 (Aug. 29, 2008) (codified at 16 C.F.R. § 310.1 *et seq.*) As the FTC noted:

> "While proactive patients who are attentive to their healthcare may be likely to provide a written agreement to authorize prerecorded messages from their healthcare providers, such reminders and other communications are most needed by the patients who are least attentive to their healthcare—those who 'frequently procrastinate or make ill-informed decisions'—and therefore are least likely to get around to responding to requests for authorization to receive such calls."

Final Rule at 51191. Comments to the FTC advocating an exemption to the TSR's consent requirements for healthcare-related prerecorded messages (such as prescription refill reminders) explained that such calls not only improve patient outcomes but also help control healthcare costs. In fact, it was reported that "up to 70% of patients with long-term prescriptions fall off therapy in the absence of prescription refill reminders, with resulting costly adverse impacts, including increased hospitalization, morbidity and mortality rates." Final Rule at 51191 (quotations omitted). Moreover, "available alternatives to the use of interactive prerecorded messages are more expensive, less efficient or less successful in communicating with patients; and would strain the ability of the healthcare system to comply without passing on significant cost increases." Final Rule at 51190, n.327 (citations omitted). Based on the record before it, the FTC recognized that:

> "[I]n addition to generating demonstrable improvements in patient outcomes, the use of inexpensive prerecorded calls plays an important cost-containment role in the provision of medical services, many of them publicly funded, and in facilitating the record-keeping that government healthcare reimbursement regulations require. Requiring the prior written agreement of patients to receive prerecorded calls subject to HIPAA quite obviously could jeopardize the

> improved medical outcomes that such calls have made possible by enabling healthcare providers to achieve higher rates of patient compliance with treatment regimens at low cost."

Id. And, as mentioned, the FCC found that "our record affirmatively supports adopting the FTC's approach" and "we agree with the FTC approach." 2012 Order at 1853, 1856.

In sum, the FCC determined that healthcare communications, such as prescription refill reminders, "serve a public interest purpose" and are to be encouraged, not impeded. Having made that determination, the FCC reiterated in its 2015 Order that "provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8029 (2015). Petitioners provide no justification for the Commission to reverse this ruling.

III. Pharmacy to Patient Communications Are Critical to Patient Health

As an essential participant on a healthcare team, pharmacies provide their patients with several types of important healthcare communications. These pharmacy communications remind patients to pick up prescriptions that have been filled, remind patients they are due to refill prescriptions pursuant to their doctors' orders, remind patients that it is time to get their annual flu shots as they have at their pharmacy in the past, inform patients about potential safety issues associated with their medications such as drug recalls, and inform patients about the importance of following appropriate directions for use of their medications. These notifications rapidly and conveniently alert patients to important and time-sensitive information that is critical to the medically appropriate use of their prescribed medications.

Prescription notifications such as refill reminders and related HIPAA-covered communications from pharmacies address a major medical problem affecting patient health: millions of Americans forget to take their medications as prescribed by their doctors. Studies consistently show that twenty to thirty percent of prescriptions are never filled and half of medications for chronic disease are not taken as prescribed.[8] This has significant healthcare implications.

Failure to take medications as prescribed, known as medication non-adherence, harms patient health. Non-adherent patients are more likely to experience preventable disease progression, increased hospitalizations, doctor and emergency room visits and other problems arising from poor health.[9] Non-adherence causes an estimated 125,000 deaths a year and up to ten percent of all hospitalizations.[10] Medication adherence is particularly important to a broad range of serious chronic conditions such as heart disease, depression[11] and diabetes. Non-adherence allows chronic conditions to progress, leading to avoidable complications and reduced well-being.

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[8] A. Iuga, *et al.*, "Adherence and Health Care Costs," Risk Management and Health Care Policy (2014):7, 35-44, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3934668/pdf/rmhp-7-035.pdf; M. Viswanathan, *et al.*, "Closing the Quality Gap: Revisiting the State of the Science," Medication Adherence Interventions: Comparative Effectiveness, AHRQ Pub. No. 12-E010-EF (Sept. 2012), available at http://www.ncbi.nlm.nih.gov/books/NBK114350/.

[9] A. Iuga, *et al.*, *supra*, at 36.

[10] M. Viswanathan, *et al.*, "Interventions to Improve Adherence to Self-administered Medications for Chronic Diseases in the United States: A Systematic Review," *Ann Intern Med* (2012);157(11):785-795, (Nov. 20, 2015), http://annals.org/article.aspx?articleid=1357338.

[11] *See, e.g.*, N. Choudhry, *et al.*, "Untangling the Relationship Between Medication Adherence and Post-Myocardial Infarction Outcomes," *Am Heart J* (2014); 167(1):51-58, (Nov. 20, 2015), http://www.ahjonline.com/article/S0002-8703(13)00667-4/fulltext (finding that achieving medication adherence of 80% or higher reduced the risk of hospital readmission after a heart attack); D. Pittman, *et al.*, "Adherence to Statins, Subsequent Healthcare Costs, and Cardiovascular Hospitalizations," *Am. J. of Cardiology* (June 2011) at 1662, 1665-66, available at http://www.ajconline.org/article/S0002-9149(11)00465-6/pdf (finding that patients with high rates of adherence to statins had significantly lower total healthcare costs and lower risk of cardiovascular disease-related hospitalizations); C. Melfi, *et al.*, "The Effect of Adherence to Antidepressant Treatment Guidelines on Relapse and Recurrence of Depression," *Arch Gen Psychiatry* (1998);55(12):1128-1132, (Nov. 20, 2015), http://archpsyc.jamanetwork.com/article.aspx?articleid=204538 (concluding that adherence to depression treatment guidelines with an antidepressant reduces the probability of relapse or recurrence).

Addressing this problem becomes more pressing as the number of Americans with chronic illnesses increases.[12]

Failure to take medications as prescribed also dramatically increases overall healthcare costs. Medication non-adherence causes up to $290 billion in increased healthcare costs every year, due to preventable medical complications and resulting physician visits and hospitalizations.[13]

Pharmacy communications such as refill reminders and other prescription notifications, which function as medication compliance communications, reduce the incidence of medication non-adherence.[14] Pharmacy medication adherence programs have a demonstrated track record of improving patient health while simultaneously decreasing overall healthcare costs. For example, a 2013 study performed for the federal Centers for Medicare and Medicaid Services ("CMS") found that medication therapy management programs consistently and substantially improved medication adherence for Medicare patients, leading to significant reductions in hospital costs, such as average savings of $400 to $525 in hospitalization costs for each patient with diabetes and congestive heart failure.[15] Additionally, a 2012 study identified the key role that community pharmacies play in improving patient medication adherence, concluding that pharmacy

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[12] Chronic diseases affect approximately 133 million Americans, and that number is expected to increase to 157 million by 2020. Centers for Disease Control and Prevention, The Power of Prevention (2009), available at www.cdc.gov/chronicdisease/pdf/2009-Power-of-Prevention.pdf.

[13] New England Healthcare Institute, "Thinking Outside the Pillbox: A System-wide Approach to Improving Patient Medication Adherence for Chronic Disease," Research Brief (August 2009), available at http://www.nehi.net/writable/publication_files/file/pa_issue_brief_final.pdf .

[14] A. Iuga, *et al.*, *supra*, at 40 (listing reminders and 'automated alerts" as strategies to improve medication adherence).

[15] D. Perlroth, *et al.*, "Medication Therapy Management in Chronically Ill Populations: Final Report Prepared for CMS" (August 2013) at 9, 83, 113, available at https://innovation.cms.gov/files/reports/mtm_final_report.pdf.

adherence programs contributed to improved behavior with a return on investment of three to one.[16]

One of the critical tools that pharmacists use to help increase medication adherence is to quickly and efficiently contact patients on their phones to alert them to information related to their prescriptions. After reviewing more than 100 studies, the United States Department of Health and Human Services ("HHS") found "encouraging evidence related to the use of health text messaging to improve health promotion, disease prevention, and disease management."[17] In 2012, two independent, randomized studies showed that receiving a text message more than *doubled* the percentage of low income families who sought flu vaccines for their infant children, and *doubled-to-tripled* the percentage of low income families who sought meningococcal and tetanus-diphtheria-acellular pertussis vaccines for their adolescent children.[18]

Notably, using an automated system to make pharmacy healthcare calls is supported by the federal government's own research. A recent study funded by the HHS Agency for Healthcare Research and Quality ("AHRQ") concluded that prescription refill reminders sent via automated

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[16] T. A. Brennan, *et al.*, "An Integrated Pharmacy-Based Program Improved Medication Prescription and Adherence Rates in Diabetes Patients," *Health Affairs* 31, no. 1 (2012), at 125, 126 , (Nov. 9, 2015), http://content.healthaffairs.org/content/31/1/120.full; *see also* J. Pringle, *et al.*, "The Pennsylvania Project: Pharmacist Intervention Improved Medication Adherence And Reduced Health Care Costs," *Health Affairs* 33, no. 8 (2014), at 1444, 1449, (Nov. 18, 2015), http://content.healthaffairs.org/content/33/8/1444.full.pdf+html (pharmacy adherence program increased medication adherence by 75%, generating average savings of $341 per patient receiving oral diabetic medication and $241 for patients receiving a statin).

[17] HHS Health Resources and Services Admin., *Using Health Text Messages to Improve Consumer Health, Knowledge, Behaviors and Outcomes: An Environmental Scan* (May 2014) at 27, available at http://www.hrsa.gov/healthit/txt4tots/environmentalscan.pdf; *see also* T. Harrison, "A Randomized Controlled Trial of an Automated Telephone Intervention to Improve Blood Pressure Control," *J. Clinical Hypertension* (Sept. 2013) 650;15(9), available at http://onlinelibrary.wiley.com/doi/10.1111/jch.12162/pdf (evaluating effectiveness of telephonic outreach program to improve blood pressure control among patients with hypertension and concluding healthcare organizations should consider using telephone outreach for quality-improvement interventions).

[18] M. Stockwell, *et al.*, "Text4Health: Impact of Text Message Reminder-recalls for Pediatric and Adolescent Immunizations," *AM. J. Public Health* (Feb. 2012) e15;102(2), (Nov. 20, 2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483980/ (demonstrating through two studies that text messaging for reminder–recalls improved immunization coverage).

telephone calls "significantly increased adherence" to statins and other cardiovascular disease medications, leading to significantly lower cholesterol levels among at-risk patients.[19] Other studies demonstrate similar success for medication adherence programs that utilize automated telephone calls.[20] In fact, AHRQ has posted on its website a guide promoting the use of automated telephone refill reminders entitled "Automated Telephone Reminders: A Tool to Help Refill Medicines On Time."[21] The AHRQ publication notes that "non-adherence to prescription medications is a documented public health problem,"[22] and concludes that "telephone reminders to refill or pick up prescriptions improve medication adherence."[23] The benefits and necessity of pharmacy healthcare communications, such as prescription notifications, reinforce the FCC's earlier rulings that healthcare communications should be exempted from any written consent requirement and that the TCPA's prior express consent requirement is fulfilled by the provision of a phone number. For this reason alone, the Commission should deny the Petition.

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[19] M. Vollmer, *et al.*, "Improving Adherence to Cardiovascular Disease Medications With Information Technology," *Am J Manag Care* (2014);20 (11 Spec No. 17):SP502-SP510, (Nov. 18, 2015), http://www.ajmc.com/journals/issue/2014/2014-11-vol20-SP/Improving-Adherence-to-Cardiovascular-Disease-Medications-With-Information-Technology/.

[20] *See, e.g.*, T. Harrison, *et al.*, "Automated Outreach for Cardiovascular-Related Medication Refill Reminders," *J Clin Hypertens* (2015): 10.1111/jch.12723, available at http://onlinelibrary.wiley.com/doi/10.1111/jch.12723/epdf; B. Bender, *et al.*, "Pragmatic Trial of Health Care Technologies to Improve Adherence to Pediatric Asthma Treatment," *JAMA Pediatr.* (2015);169[4]:317-323, (Nov. 18, 2015), http://archpedi.jamanetwork.com/article.aspx?articleid=2108035&resultClick=3.

[21] AHRQ Pub. No. 08-M017-EF (2008), (Nov. 18, 2015), http://archive.ahrq.gov/research/findings/factsheets/tools/callscript/pharmacy-call-scripts.html.

[22] *Id., citing, inter alia,* H. McDonald *et al.*, "Interventions to Enhance Patient Adherence to Medication Prescriptions: Scientific Review," *JAMA* (2002);288: 2868-79.

[23] AHRQ Pub. No. 08-M017-EF, *supra, citing* D. Kennedy, *et al.*, "Evaluation of Patient Adherence From a Telephone Intervention Program in Community Pharmacy Practice," *Virginia Pharm* (2000);84(Nov):23-27; C. Simkins, *et al.*, "Evaluation of a Computerized Reminder System in the Enhancement of Patient Medication Refill Compliance," *Drug Intell & Clin Pharm* (1986);20(Oct):799-802; *and* F. Ascione, *et al.*, "Evaluation of a Medication Refill Reminder System for a Community Pharmacy," *Pt Educ & Couns* (1985);7(2):157-65.

IV. Petitioners Incorrectly Imply the FCC Has Not Been Clear that Provision of Phone Numbers by Patients to Healthcare Providers Constitutes Prior Express Consent for Healthcare-Related Communications.

Petitioners claim that the FCC in its prior orders and rulings has not been clear as to whether the provision of a phone number constitutes consent in "any other, non-debt collection contexts." *See* Petition at 33. As it relates to healthcare communications of the kind made by pharmacies, such a claim is wholly incorrect. More specifically, as mentioned above, the FCC stated in its 2015 Order "that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8029 (2015). There is simply no uncertainty requiring a declaratory ruling.

The application of this type of prior express consent to pharmacies was validated in a recent case out of the Northern District of California. In *Jackson v. Safeway*, the court granted summary judgment to a pharmacy that had been subject to a TCPA class action initiated by a patient who received pre-recorded flu shot reminder calls at the cell phone number she provided. *See Jackson v. Safeway, Inc.*, 2016 WL 5907917, N.D. Cal. (October 11, 2016). In that case, the plaintiff had gone to her local pharmacy for a flu shot. *Id.* at *1. In connection with that visit, the plaintiff was asked to complete paperwork in which she provided her cell phone number. Later that same year, the pharmacy, using pre-recorded messages, contacted its current patients who had received a flu shot in the past year but had not received one for the current flu season, to remind them to get an updated flu shot. *Id.* at *2. Plaintiff received one of

those calls, and the very next day went to get her updated flu shot.[24] *Id.* Early the next year, she received another such call. *Id.* Claiming, in part, that the flu shot reminder calls from her local pharmacy from which she had previously received a flu shot had been made without her prior express consent in violation of the TCPA, plaintiff brought a class action against the pharmacy. *Id.*

In reviewing the pharmacy's Motion for Summary Judgment based on the provision and scope of the plaintiff's prior express consent, the court found that prior express consent had been given and that flu shot reminder calls were well within its scope. *Id.* at *10-11. The court expressed no hesitation in relying on the FCC's determination that providing a phone number to a healthcare provider constitutes prior express consent for healthcare calls "closely related to the purpose for which the telephone number was originally provided." *Id.* at *10 (internal citations omitted).[25] The court rejected the Plaintiff's argument that the consent was only broad enough to apply to calls related to the first flu shot given when the paperwork was filled out. *Id.* at *10-11. Rather, it determined that the consent covered communications that bore "some relation to the reason for which the number was originally provided[.]" *Id.* at *10. As a result, the court found that the pharmacy's "flu shot reminder calls to [p]laintiff for future flu seasons bear sufficient relation to the original reason for which [p]laintiff provided her number" and granted the pharmacy's motion for summary judgment. *Id.* at 11-12.

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[24] This important fact provides direct evidence of the efficacy of such calls and reinforces the argument presented, *supra*, in Section III.

[25] In arriving at its conclusion, the court recognized the critical public health interest in getting timely flu shots, stating that "the importance of flu shots to a patient's health, and to the general public, is established by the fact that the Center for Disease Control has recommended the flu vaccine to *everyone* six months of age and older for every season since February 2010." *Id.* at *5 (emphasis in the original).

V. Conclusion

Reversing the express consent rule for healthcare communications would invariably fuel more abusive class action litigation against healthcare providers, as exemplified above. Indeed, it appears this may be the sole reason Petitioners—who are professional TCPA plaintiffs— have filed their Petition. The Commission should not allow its rules and procedures to be used for private gain by the plaintiff's bar, especially where that gain would come at the expense of positive healthcare outcomes for patients all across the United States.

For the reasons provided herein, NACDS requests that the Commission deny the Petition.

Respectfully submitted,

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National Association of Chain Drug Stores

Don L. Bell, II
General Counsel
Mary Ellen Kleiman
Deputy General Counsel
1776 Wilson Blvd.
Suite 200
Arlington, VA 22209
(703) 837-4327